COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 057165-96 056925-98**

Ann Bouras	Employee
Salem Five Cent Savings Bank	Employer
Charter Oak Insurance Company	Insurer
Twin City Fire Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine and McCarthy)

APPEARANCES
Arthur J. Palleschi, Esq., for the employee
James A. Garretson, Esq., for Charter Oak at hearing
Beth R. Levenson, Esq., for Charter Oak on appeal
Christine M. Harding, Esq., for Twin City

CARROLL, J. Charter Oak Insurance Company ("Charter Oak"), the first insurer in this successive insurer case, appeals from a decision in which an administrative judge awarded benefits for an emotional injury, which he found causally related to events at work.[1] Because the judge failed to support his award of § 35 benefits with reasoned vocational analysis, we recommit the case for further findings on the extent of incapacity.

The employee worked as a customer service representative with the employer. Between March 4, 1996 and May 1997, she worked under the supervision of Thomas Aguiar at the employer's Peabody branch. There, she was subjected to harassment, ridicule and humiliation by Mr. Aguiar and co-employees. The employee complained to superiors, and she was transferred to the employer's Swampscott branch in May 1997. (Dec. 6-7.)

At the Swampscott office, the employee was denied promotions, and felt she was being treated unfairly. In 1999, the employee received two corrective warnings for errors

[1] "Personal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment." G.L. c. 152, § 1(7A).

she made in regard to customer accounts, and resigned. (Dec. 7, 11.) The employee filed a claim for emotional injury benefits under G.L. c. 152, § 1(7A), alleging that events at both the Peabody and Swampscott offices caused her debilitating psychological distress. (Dec. 5.)

The parties introduced their own medical evidence, having opted out of the impartial medical examination. (Dec. 3-4.) Charter Oak, the insurer of the employer's Peabody branch during the time the employee worked there ("first insurer"), introduced a report of its expert psychiatrist, Dr. Michael Rater, who examined the employee on June 21, 2001. Dr. Rater diagnosed the employee with a major depressive disorder, that was only tangentially related to events at work, which he found to be related to other factors in the employee's life. (Dec. 9-11.) Twin City Fire Insurance Company, the insurer of the employer's Swampscott branch at the time the employee worked there ("second insurer"), introduced a report of its expert psychiatrist, Dr. Robert Weiner. (Dec. 3.) Dr. Weiner opined that the employee did not suffer from a psychiatric impairment. (Dec. 11.)

The employee introduced reports of her treating psychiatrist, Dr. Jason E. Mondale. Dr. Mondale diagnosed the employee with major depression causally related to events at both the Peabody and Swampscott offices of the employer. Dr. Mondale specifically ruled out non-work factors as causes for the employee's depression. (Employee Ex. 5, p. 2-3.) Dr. Mondale opined that the employee should not return to her former work with the employer. (Dec. 8-9.)

The judge concluded that the employee's claim for emotional injury stemming from the events at the Swampscott branch were barred by the bona fide personnel action exception to such injuries, under the applicable clauses of §§ 1(7A) and 29.[2] The judge found that the actions of the employee's supervisor there were professional and did not

[2] "No mental or emotional disability arising principally out of a bona fide, personnel action including a transfer, promotion, demotion, or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter." G.L. c. 152, §§ 1(7A), 29.

indicate an intent to inflict emotional distress. (Dec. 12-13.) On the other hand, the judge concluded that the actions of Mr. Aguiar, the employee's supervisor at the Peabody branch in 1996-1997, were actionable work events under § 1(7A). Based on the employee's credible testimony, and the medical opinion of Dr. Mondale, which he adopted, the judge awarded the employee partial incapacity benefits from December 15, 1999, the commencement of the employee's claim, until December 15, 2002.[3] (Dec. 14-18.)

Charter Oak, the first insurer, against which the judge issued his order of payment, argues various points on appeal as to why the decision is in error. We find one of the insurer's arguments persuasive, that the evidence does not support the judge's incapacity findings. As a result, we recommit the case for further findings.

First, we briefly discuss the first insurer's main argument based on the medical evidence in the case. The insurer argues that the adopted opinion of Dr. Mondale did not sustain the employee's burden of proving that work events were a predominant contributing cause of her emotional incapacity under § 1(7A), see Joyce v. City of Westfield, 15 Mass. Workers' Comp. Rep. 101, 106 (2001), and that the judge erroneously found that work events were the major cause of incapacity. Although we agree that the judge erroneously applied "major," as opposed to the correct "predominant," cause for emotional injuries under § 1(7A), such error is harmless. Dr. Mondale's opinion easily satisfied the "predominant" cause standard, without stating the "magic word," since he specifically ruled out all other potential causes of emotional incapacity in the employee's life. Where only the work contributors remain as causes, they satisfy the § 1(7A) standard of "predominant contributing cause." See Sawicka v. Archdiocese of Boston, 14 Mass. Workers' Comp. Rep. 362, 370 (2000)("only cause" must satisfy predominant contributing cause standard).

[3] We can see nothing in the record to support the termination date for the § 35 benefits ordered by the judge. However, the employee has not cross-appealed, and we need not address it.

On the other hand, we agree with the insurer that the judge did not explain how it was that this employee only had the minimal weekly earning capacity ($90.79) that he found. The medical evidence was indeed that the employee could not return to her former work with the employer in either location – not that she was incapable of performing any work. (Employee's Exs. 2-5.) The employee's vocational profile as a real estate broker and paralegal belies the judge's conclusion that she was only capable of earning $90.79 per week. (Dec. 6, 18.) The judge merely incants, without analysis, the factors of age, education, training and experience under Frennier's Case, 318 Mass. 635, 639 (1945). This is error, for which we must recommit the case. See Griffin v. State Lottery Comm'n, 14 Mass. Workers' Comp. Rep. 347, 349 (2000)("It is not enough that the judge merely incant the vocational factors enunciated in Frennier's Case, [supra] and Scheffler's Case, 419 Mass. 251, 256 (1994). The judge must make findings addressing these factors"). See Scheffler, supra at 258 (decisions must have "adequate evidentiary and factual support and disclos[e] reasoned decision making within the particular requirements governing a workers' compensation dispute").

Accordingly, we recommit the case to the administrative judge for further findings of fact on the extent of the employee's incapacity.

So ordered.

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Martine Carroll
Administrative Law Judge

Filed: **July 22, 2004**

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Frederick E. Levine
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge